IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 195 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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REGIONAL PROVIDENT COMMISSIONER-I - Applicant(s)

Versus

M.A.KUVADIA,O.L.OF ARYODAYA SPINNING & WEAVING MILLS LTD. & 2 - Respondent(s)

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Appearance :

MR PJ MEHTA for Applicant(s) : 1,
OFFICIAL LIQUIDATOR for Respondent(s) : 1,
MR DS VASAVADA for Respondent(s) : 2,
MR RM DESAI for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 31/08/2005

ORAL JUDGMENT

1.Heard the learned Counsel appearing for all the parties finally. The present application is preferred by the

Regional Provident Fund Commissioner for the relief, inter alia, to direct the Official Liquidator – Respondent No.1 herein to release the statutory dues of employees' provident fund and other allied statutory deductions of Rs.79,71,834/- along with the levy of damages, etc.

2. Heard Mr.Mehta, learned Counsel for the applicant, Representative of the O.L., Mr.Vasavada, learned Counsel for Respondent No.2 and Mr.R.M.Desai, learned Counsel for Respondent No.3.

3. It has been submitted on behalf of the applicant that the dues of the provident fund and the contribution to the provident fund as per Section 11 of the employees Provident Funds and Miscellaneous Provisions of Act, 1952 (hereinafter referred to as “the EPF Act” for short), shall stand in priority over all other statutory dues as per provisions contemplated under Section 530 of the Companies Act, 1956 (hereinafter referred to as “the Act”). It has further been submitted on behalf of the applicant that in view of Section 11(2) of the Act, there is a statutory deeming fiction of first charge on the assets of the establishment and the effect is with the non-obstacle clause and, therefore, it has been submitted that notwithstanding anything contained in any other law for

the time being in force, which may include the provisions of the Transfer of Properties Act, the dues or the amount to be recovered by the Provident Fund Commissioner, which is of the amount deducted from the wages of the employees, is to be treated as having first charge on the assets of the establishment and, therefore, it has been submitted that such dues would fall within the category of the dues under Section 529A of the Act and not under Section 530 of the Companies Act having priority vis-a-vis other statutory dues. It has also bee submitted that out of the movable properties of the company in liquidation the amount has been disbursed and, therefore, proportionately, in any case, the amount be disbursed to the Provident Fund Commissioner from the fund which is realized and may be realized treating the claim at par with the other secured creditors and workmen dues, keeping in view of the provisions of Section 529A of the Act.

4. Mr.Mehta, learned Counsel has relied upon the decision of Allahabad High Court in case of **“Regional Provident Fund Commissioner v. O.L., Allahabad”, reported in 1969 LLJ, 811** and he has also relied upon the decision of Kerala High Court in case of **“P.V.Joseph v. O.L. And Ors.”, reported in 2002 Factories Journal Report (Vol.100) (Ker), 197**, for contending that the claim of

the Provident Fund Commissioner pertaining to the contribution not deposited with the Provident Fund Commissioner would stand at par with the secured creditors under Section 529A of the Act and, therefore, it has been prayed that appropriate directions may be given for such purposes.

5. Mr.Desai, learned Counsel appearing for the respondent secured creditors has contended, inter alia, that the statutory dues, may be with charge or without charge, cannot be included in the category of the dues to be provided under Section 529A and it has been submitted that even if the charge is considered as statutory charge as per Section 11(2) of the E.P.F. Act it is a charge on the assets of the establishment. He submitted that the properties are mortgaged with the secured creditors and, therefore, until the full money is paid, such charge cannot be enforced and it has also been submitted that as such, such dues even if it is with charge would fall in the category of Section 530 of the Act in the statutory dues like ESI, for Recovery for Employees State Insurance fund, Sales Tax, Income Tax dues etc. It has been further submitted on behalf of the respondent secured creditors that the workmen are claiming the amount of P.F., in their dues under Section 529A of the Act and as per the statutory

provision such charge of workmen's dues are to stand on pari passu and, therefore, there would be double payment of the same amount of P.F., which is otherwise claimed by the workmen with the O.L., under Section 529A of the Act. It has been submitted that for the contribution of E.S.I., the Division Bench of this Court (Coram: R.S. Garg and Ravi R. Tripathi, J.J.), as per its order dated 4.8.2005 in Company Application No.216/1997 in Company Petition No.205/1996 and allied matters has taken the view that after the dues under Section 529A of the Act are satisfied and if the payment is to be made under Section 530 of the Act, such dues may fall in priority and not at par with the dues under Section 529A. Mr.Desai, learned Counsel appearing for secured creditors has also relied upon the decision of the Supreme Court in case of **"Dena Bank v. Bhikhabhai Prabhudas Parekh & Co., and Anr.", reported in 2000(5) SCC, 694** and more particularly the observations made at para 10 for contending that the dues of the crown cannot have the priority over the secured creditors, but it can have priority only qua Ordinary and Unsecured Creditors. Therefore, it is submitted that it is only after the satisfaction of the claim of the secured creditors and of the workmen, the amount to be recovered by the Provident Fund

Commissioner is to be paid as per Section 530 of the Act by the O.L., and at present up till now the stage has not reached and, therefore, the present application may not be granted by this Court.

6. Mr.Vasavada, learned Counsel appearing for the respondent No.2. Union representing the workmen submitted, inter alia, that the claim as such is already lodged by the workmen concerned with the O.L., and some payment while making distribution from the amount already released is made to the workmen concerned. He submitted that the details which has been produced by the applicant, inter alia, shows that towards the P.F. Contribution, the dues are of Rs.42,39,830.10 and of Rs.37,32,004.70 is towards damages and he submitted that if the applicant is directed to give the details of the concerned workmen in respect of whom the contribution is sought to be recovered by giving break-up of the amount of Rs.42,39,830.10, the respondent No.2 will also lodge the additional claim towards the P.F., dues, if not lodged with the O.L., and the same may be considered in priority at pari passu with the secured creditors as per the Section 529A of the Act and he submitted that so far as the amount of damages of Rs.37,32,004.70 is concerned, it would, in any case, not be under Section

529A, but would fall in the category under Section 530 as per the statutory priority in accordance with law and, therefore, the question of payment would arise only at that stage. He further submitted that the applicant which is P.F. Authority may be directed to furnish details, for such purpose, of the employees concerned so that the Union can file the claims, if not filed.

7. Section 11 of EPF Act reads as under:

> ***"11.Priority of payment of contributions over other debts:***-*[(1)] [Where any employer is adjudicated insolvent or, being a company, an order for for winding-up is made, the amount due-*
> *(a)from the employer in relation to [an establishment] to which any [Scheme or the Insurance Scheme] applies in respect of any contribution payable to the Fund [or as the case may be, the Insurance Fund] damages recoverable under Sec.14-B, accumulations required to be transferred under sub-section (2) of Sec. 15 or any charges payable by him under any other provision of this Act or of any provision of the [Scheme or the Insurance Scheme]; or*
> *(b) from the employer in relation to an exempted [establishment] in respect of any contribution to the [the provident fund or any insurance fund] (in so far as it relates to exempted employees), under the rules of [the provident fund or any insurance fund], [any contribution payable by him towards the [Pension] Fund under sub-section (6) of Sec. 17] damages recoverable under Sec. 14-B or any*

charges payable by him to the appropriate Government under any provision of this Act or under any of the conditions specified under Sec.17, shall, where the liability therefore has accrued before the Order of adjudication or winding-up is made, be deemed to be included among the debts which under Sec. 49 of the Presidency-towns Insolvency Act, 1909 (3 of 1909), or under Sec. 61 of the Provincial Insolvency Act, 1920 (5 of 1920), or under (Sec. 530 of the Companies Act, 1956 (1 of 1956)] are to be paid in priority to all other debts in the distribution of the property of the insolvent or assets of the Company being wound-up, as the case may be."

8. As such for interpretation of Section 11(1) of the EPF Act, no further discussion may be required in view of the above referred decision of the Division Bench of this Court in Company Application No.216 of 1997 in Company Petition No.205 of 1996 and allied matters. Since the language of Section 94 of EPF Act as considered by the Division Bench at para 4 is in substance the same for giving priority to the claim of ESI contribution in the category of payment contemplated under Section 530 of the Act. It may be recorded that at para 10 and 11, the observations of the Division Bench are as under:

"10. Section-530, Sub-section(1), clearly observes that in a winding up matter, subject to the provisions of Section-529(A), there shall be

paid in priority to all other debts, dues of the Government, which are in the form of revenues, tax, etc. When Section-530 is made subordinate to Section-529(A), then, a Court is obliged to look into the material provisions as contained under Section-529(A). Section-529(A) clearly provides that notwithstanding anything contained in any other provision of the Companies Act or any other law for the time being in force, in the winding up of a company, workmen's dues and debts due to the secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section-529 pari passy with such dues, shall be paid in priority to all other debts.

11. Section-529(A) has been introduced in the year 1985. It starts with a non-obstante clause. It clearly provides that "notwithstanding anything contained in any other provision of the Act or any other law for the time being in force". A true understanding of Section-529(A) would make clear that the provisions of Section-529(A) shall override the provisions contained in Section-530. Not only this, the provisions contained in Section-529(A) shall override the provisions contained in the ESI Act because the ESI Act is an Act of 1948, while the amendment in the Companies

Act has been made in the year 1985 and with the fullest knowledge that it was to override the provisions contained in Section-530. If Section-94 of the ESI Act and Section-530 of the Companies Act are made subordinate to Section-529(A), then, Section-529(A) shall march over the rights of others to which the others are entitled either under the special laws or under Section-530 of the companies Act. A combined/conjoint reading of Section-529(A) of the Companies Act would make clear that in a matter of winding up, the workmen's dues and the debts due to the secured creditors to the extent such debts rank under clause (c) of the proviso to Sub-section (1)of Section-529(A) pari passu with such dues, shall be paid in priority to all other debts. If such dues and debts are paid in full and even thereafter, some money is left with the Official Liquidator for its distribution, then, such money can be distributed under Section-530 of the Companies Act. When such a situation crops up, the State Government or the Central Government of the Local Authority may file their claim before the learned Company Judge and at that point of time, they may say that in view of their preferential right, either under the Local Act or under Section-530 of

the Companies Act, they be paid."

9.Thereafter, at para 15, it has been concluded qua third question as under:

"15. The third question referred for our answer is that the properties/assets of the Company, which have already been mortgaged or earmarked by the secured creditors and when the Company is in liquidation, whether the Liquidator would have that equity alone and whether the entire amount would be required to be paid to the secured creditors or the ESI Corporation would be entitled to priority over the said dues in this behalf.

In absence of Section-529(A), the answers certainly could be in favour of the ESI Corporation. Since after introduction of Section-529(A) and amendment to Section-530 of the Companies Act, the legal position is changed. When the Official Liquidator acquires or possesses the securities mortgaged with the secured creditors, then, the Official Liquidator would be obliged to observe the provisions of Section-529(A) and Section-530 of the companies Act. The question of equity would not arise because in a case where the securities/properties/assets are not sufficient to discharge the liability of the

creditors described under Section-529(A) of the Companies Act, the question of payment under Section-530 of the Act would not arise. Section-530 of the Companies Act would come into operation only after the liability under Section-529(A) is discharged and some money is still left."

10. Therefore, if the applicant is to press in service of Sub-section(1) of Section 11 of EPF Act, the same will be the position and the PF contribution may stand on the same priority as contemplated under Sub-section (1) of Section 11 over the other statutory dues to be considered under Section 530 of the Act.

11. The contention raised by claiming priority or for including the claim under Section 529A of the Act by taking support of Sub-Section(2) of Section 11 of the EPF Act deserves to be examined further. The perusal of Sub-Section (2) of Section 11 shows that the legislature has used the language "the amount so due shall be deemed to be the first charge on the assets of the establishment and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts." The use of the words "deemed to be the first charge", and the words "assets of the establishment", and the words "in

priority to all other debts" may call for further scrutiny. It deserves to be recorded that the language used by the legislature is priority to all other debts and not the secured creditors/secured debts. In normal circumstances it may include the debts payable to the workmen but it is on account of the express provisions under Section 529A of the Act the workmen's dues are treated at par with the dues of the secured creditors. Therefore, the language "priority to all other debts" cannot be said to be inclusive of the secured creditors for which there is express provision made under Section 529A of the Act. In view of the use of the words by the legislature "shall be deemed to be the first charge on the assets of the establishment", the first charge has to be maintained, but such first charge shall be on the assets of the establishment. If any interest is created in the properties of a secured creditor, the secured creditor shall continue to hold the interest in such assets or the property of the company or establishment. After the realisation of the secured interest of secured creditor in the properties of the Company, the first charge by statutory deeming fiction may continue to hold good, but it cannot be read as allowing to march over the interest of the secured creditors. As observed earlier the workmen's

dues would have also been in priority after the secured creditors' dues, but only in view of the express provisions of Section 529A of the Act, the priority for payment is treated at pari passu with the secured creditors. Therefore, the contention of Mr.Mehta that the express provision in the statute providing for the first charge on the assets of the establishment would stand at par with the other secured creditors or would stand above the secured creditors as provided under Section 529A of the Act cannot be accepted.

12.Further, it deserves to be recorded that Sub-section(2) of Section 11 was brought into the statute book in the year 1973 by Act 40 of 1973 w.e.f. 1.11.1973 and at the relevant point of time, Section 529A was not there in the statute book in the Companies Act. Section 529A is inserted in the year 1985 by Act 35 of 1985. Therefore, when the legislature inserted Sub-section (2) of Section 11 of the Act, Section 529A was not in existence at all and, therefore, also it cannot be said that the claim which is covered by Sub-Section(2) of Section 11 would stand included in the category of the priority as provided under Section 529A of the Act and, therefore, the contention of Mr.Mehta deserves to be rejected to that extent.

13.As recorded hereinabove, after 1973, as Sub-section

(2) is inserted in Section 11 of the EPF Act, and the provision is also made under Section 529A of the Act for giving treatment to the workmen's dues for payment pari passu with the secured creditors, any claim by the Provident Fund Commissioner in respect to the PF contribution, which is covered by the category under Section 11(2) of the EPF Act, as such would remain as the claim, until it is not made by the workmen under Section 529A of the Act. If the workmen have already claimed the dues of PF under Section 529A of the Act, the claim made by PF Authority for recovery of the Contribution of PF under Section 11(2) of the Act shall get reduced to that extent, since none can be allowed to claim the very payment twice.

14. However, if no such claim is made by the workmen concerned for payment under Section 529A and the claim as contemplated under Section 11(2) of the EPF Act is only to be enforced, then in that case after the satisfaction of the claim of the secured creditors, if any assets of the establishment remain for disbursement, the same can be traced for enforcing the first charge on the assets as per Sub-section(2) of Section 11 of the EPF Act by the Provident Fund Authority. If the dues are under Section 11(1) of the Act, then in that case, as observed earlier, it may

march over other dues of the category provided under Section 530 of the Act. However, the dues as sought to be enforced as per Section 11(2) of EPF Act shall also over march the dues which are categorized and which may fall under Section 11(1) of EPF Act since by statutory fiction the first charge is created over the assets of the establishment. It will be for the O.L., to draw the attention of this Court at the relevant time when the amount is to be disbursed or distributed, but until that stage has reached, the prayer of the applicant to disburse the amount as claimed cannot be accepted.

15. It appears that it would be in the interest of the workers concerned, if such claim, may be the claim under Section 11(1) for unpaid contribution or under Section 11(2) for non-deposit after deduction is included in the claim lodged as workmen's dues in the category of Section 529A, but such will be at the instance of the workmen concerned or through registered Union or recognized Union representing the interest of the workmen, but such cannot be by way of enforcement of the claim at the instance of the PF Authority under Section 11(2) of EPF Act. Even otherwise also, the applicant authority is supposed to act for the larger interest of the employees concerned and should facilitate the employees for realisation of its dues in

accordance with the provisions of the Act. As Mr.Vasavada has submitted on behalf of respondent No.2 for seeking bifurcation of the amount of Rs.42,39,803.10 towards PF contribution of the concerned workmen separately, I find that if such a direction is given to the applicant to supply such details to Respondent No.2, the same would be in the larger interest of the workmen's dues which otherwise can have more priority in comparison to the priority provided under Section 11(2) of the EPF Act. So far as the remaining dues of Rs.37,32,004.70 are concerned, the claim is as damages and hence for such claim the applicant may lodge the claim with the O.L., by giving details and such claim which may be made by the applicant shall be treated on priority as per the observations made by this Court hereinabove, after proper verification by O.L.

16.It is an admitted position that up till now all secured interest of secured creditors are not satisfied and, therefore, the stage of enforcement of such priority as provided under Section 11(2) has not reached. Under the circumstances, the prayer made in the application cannot be granted. However, it is direct that the applicant, if it is so applied by respondent No.2 – Labour Association may give details

of Rs.42,39,830.10 for each workman-wise separately by giving bifurcation and respondent No.2 may claim such amount in the workmen's dues for payment under Section 529A pari passu with the secured creditors in case such claim is not made or in alternative the applicant may submit the details to O.L., for the claim of P.F. Contribution on behalf of the workmen concerned amounting to Rs.42,39,830.10 and if proper details are given with necessary authentication thereof, the same shall be included in the category of workmen's dues under Section 529A of the Act. It is also made clear that the applicant shall be at liberty to lodge the claim of Rs.37,32,004.70 under Section 11(1) which shall be examined by O.L., and shall be considered at appropriate stage and at appropriate time.

17.Subject to the aforesaid observations, the application is dismissed.

31.8.2005 **(Jayant Patel, J.)**

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